

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

130

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Court of Appeals of the District of Columbia.

APRIL TERM, 1925.

No. 4321.

225

**NORA T. CUSH, EXECUTRIX OF THE ESTATE OF WILLIAM
F. CUSH, DECEASED, APPELLANT,**

vs.

WILLIAM H. H. ALLEN.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

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Court of Appeals of the District of Columbia.

No. 4321.

NORA T. CUSH, Executrix, &c., Appellant,

vs.

WILLIAM H. H. ALLEN.

a Supreme Court of the District of Columbia.

In Equity.

No. 39075.

WILLIAM H. H. ALLEN, Plaintiff,

v.

WILLIAM F. CUSH, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 Original Bill of Complaint

Filed June 3, 1921.

In the Supreme Court of the District of Columbia.

In Equity.

No. 39075.

WILLIAM H. H. ALLEN, Plaintiff,

vs.

WILLIAM F. CUSH, Defendant.

To the Supreme Court of the District of Columbia, holding an equity Court:

The plaintiff states to the Court as follows:

1. He is a citizen of the United States, a resident of the District of Columbia, of full age and brings this suit in his own right.

2. The defendant is a citizen of the United States, a resident of the District of Columbia, of full age and is sued in his own right.

3. In or about the month of August, 1915, the defendant being desirous of obtaining a contract for excavation with John H. Parker Company, a corporation, having a contract with the United States for construction of the Interior Department Building at 18th and F Streets, Northwest, in said City of Washington, applied to the plaintiff for his aid and assistance in obtaining said contract for excavation and in financing the progress and completion thereof; and it was agreed by and between the plaintiff, trading as W. H. H. Allen Construction Company, and the defendant that the said contract for

2 excavation should be taken in the defendant's name; that the defendant should have actual control and supervision of the job and contribute his plant, skill and labor, and that the defendant should furnish and use in the prosecution of the work all of the defendant's plant and equipment; and that the plaintiff would assist in obtaining such contract and the procuring of a surety bond to guarantee the faithful and prompt execution of the contract and in financing the prosecution thereof, as well as with advice and counsel; and that the plaintiff and defendant should share equally all profits and any losses arising or growing out of the said contract.

4. That the said contract for the excavation was actually entered into between the defendant and John H. Parker Company on or about the 11th day of August, 1915, through the aid and assistance of the plaintiff; and the defendant undertook the prosecution of the work and was enabled through the aid and assistance, money and financial help and credit furnished, used and extended by the plaintiff to carry the same to completion at a total cost of about Fifty Thousand (\$50,000.00) Dollars.

5. That dispute having arisen between the defendant and said Parker Company over the amount due in final settlement under said contract, it was necessary to file suit against said Parker Company in the name of said defendant Cush, as plaintiff, for the sum of Forty-six hundred and sixty-two dollars and twenty-three cents (\$4,662.23); that said suit was brought in this Court, being No. 61317 at Law, the costs thereof amounting to nearly Five hundred (\$500.00) Dollars being advanced by the plaintiff and defendant; and the plaintiff has recently been advised that before the trial

3 thereof the said Parker Company paid to the defendant, Cush, or his attorney, in or about the month of July, 1920, in settlement of the balance due on said contract for excavation the sum of Two thousand seven hundred and fifty (\$2,750.00) Dollars and said defendant Cush actually received in July, 1920, without the knowledge of the plaintiff, the sum of Two thousand three hundred and thirty-seven dollars and fifty cents (\$2,337.50), but has refused and still refuses to account for or to pay over to the plaintiff his share thereof.

6. That during the prosecution of said excavation it was necessary to acquire, buy and hire certain additional plant and equipment required for the doing of the work contemplated by said contract,

and amongst other property hired was a large amount of iron rail for a temporary railroad, said rail being of the value of about One thousand five hundred (\$1,500.00) Dollars, the return of which rail to the owner was guaranteed by the plaintiff and defendant, but the defendant has neglected and refused and still does neglect and refuse to return the same or to account to the plaintiff therefor or pay the value thereof; and amongst other property purchased for use in the prosecution of said excavation was the following:

2,257 railroad ties @ 29¢ each	\$654.43
600 punched plates cost	132.00
100 " " "	23.50
2 switches	36.00
4 ground levers	14.00
18 gasoline torches	27.00
1 Perfection oil stove	2.70

Of the total cost of \$889.63

which property or the value thereof the defendant has refused and still refuses to account for to the plaintiff.

7. That the defendant has at different times collected and received other moneys belonging to the plaintiff and defendant growing out of and arising from the prosecution of the said contract, for which the defendant has refused to account or to pay over to the plaintiff his proper share thereof, although demand has been made upon him therefor.

8. Plaintiff is advised by counsel and therefore avers that as to the said transactions a partnership existed between the plaintiff and defendant and that the plaintiff is entitled to an accounting from the defendant in reference to the receipts of money and personal property acquired and received by the defendant and the disbursements made therefrom and the disposition of said personal assets of such partnership; and the plaintiff calls upon the defendant to discover and make known such receipts and disbursements and the disposition and present whereabouts of said personal property described in the fifth, sixth and seventh paragraphs hereof.

Wherefore, the premises considered the plaintiff prays:

1. That process may issue and be served upon the defendant requiring him to answer the exigencies of this bill of complaint.

2. That the defendant be required by the decree of this Court to account fully in respect to the transaction described in this bill of complaint.

3. That the decree of this Court may be passed requiring the defendant to pay and deliver up to the plaintiff his share of any moneys and property in his hands, found by such accounting.

4. That the said partnership may be dissolved.

5. That a Receiver be appointed by this Court to take charge of and hold, subject to the orders of this Court, the partnership assets.

6. And that the plaintiff may have such other and further relief as may be proper.

The defendant is William F. Cush.

WILLIAM H. H. ALLEN,
Plaintiff.

BARNARD & JOHNSON,
Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, ss:

I, William H. H. Allen, being first duly sworn on oath depose and say that I have read the foregoing bill of complaint by me subscribed and know the contents thereof; that the facts therein stated of my own personal knowledge are true and those stated on information and belief I believe to be true.

WILLIAM H. H. ALLEN.

Subscribed and sworn to before me this 3rd day of June A. D. 1921.

[NOTARIAL SEAL.]

GEORGE W. SMITH,
Notary Public, D. C.

6

Answer to Bill of Complaint.

Filed July 14, 1921.

* * * * *

To the Supreme Court of the District of Columbia:

The defendant, William F. Cush, in answer to the bill of complaint filed herein against him, respectfully shows unto the Court as follows:

I.

1-2. The defendant admits the allegations of the first and second paragraphs of said bill.

II.

3. Referring to the allegations contained in paragraph three of said bill, the defendant denies that he applied to plaintiff for his aid and assistance in obtaining the contract therein mentioned, but says that he was talking to plaintiff about said contract and plaintiff offered to assist him. The defendant admits he made an agreement with the plaintiff in respect of said contract, but denies that it was to the tenor and effect as alleged by plaintiff.

Defendant says that in a conversation he had with the plaintiff he told him that he could secure the said contract if he had sufficient equipment, whereupon plaintiff stated that he had the necessary equipment and capital and would furnish the same for an equal

share of the profits of the contract. It was then agreed between plaintiff and defendant that the defendant would give his personal services and all his plant to the prosecution of said contract and that
7 the plaintiff would furnish whatever additional equipment and capital was necessary to carry the contract to completion; that at the end of the contract plaintiff's equipment and capital was to be returned and the profits accruing from the contract were to be equally divided. No understanding was made that plaintiff was to share any losses suffered. Upon this basis defendant put in his bid and was awarded the contract.

The defendant further says that the plaintiff did not live up to his part of the contract in any particular; that instead of furnishing additional equipment in accordance with the agreement, he hired the same at an expense of \$5,477.67, which had to be paid out of the profits of the contract, and defendant verily believes that said equipment was hired from a concern in which the plaintiff had a financial interest. Neither did plaintiff furnish the capital necessary to the completion of the work, but plaintiff and defendant borrowed it on their joint notes, for which they were charged \$262.51 by way of interest, which sum also was paid out of the profits of the contract.

Defendant says that he furnished all of his equipment and gave all of his time to the personal supervision of the job for which he took nothing by way of compensation, and that outside of hiring extra equipment and making the notes as aforesaid, the plaintiff rendered no service or assistance in and about the prosecution of the work in connection with the said contract.

III.

4. Defendant admits that the said contract for excavation was entered into between him and the John H. Parker Company on or about the day and year stated, and admits that the cost of
8 completing said contract was about \$50,000, but he denies that the plaintiff rendered any assistance except as stated in the next preceding paragraph.

IV.

5. Defendant admits the allegations contained in paragraph five of said bill, and says that he refused to account to the plaintiff for the proceeds of said settlement therein mentioned for the reason that plaintiff failed and refused to perform his part of the contract in furnishing the equipment and capital agreed to be furnished by him; that the cost of hiring the equipment and capital agreed to be furnished by plaintiff amounted to a great deal more than plaintiff's share of the profits.

V.

6. In answering paragraph six of said bill, this defendant admits that the said rails were hired and paid for out of money arising

from said contract, and defendant admits that he has not returned said rails for the reason that the same were removed after the completion of the job by persons unknown to him. He also admits the purchase, out of money arising from said contract, of the other property mentioned in paragraph six, but he denies that he has the said property in his possession. That a part of the railroad ties and punch plates were taken by plaintiff to a job of his in Terra Cotta, and the balance were disposed of by plaintiff to one Gumble and one Selden, who, defendant understands, were and are business associates of plaintiff. As to the rest of the said property mentioned in said paragraph, the defendant says the same was consumed and worn out on the job.

VI.

7. Answering paragraph seven the defendant denies the allegations therein.

VII.

8. Answering paragraph eight of said bill the defendant says that he is advised that the same is a conclusion of law and does not require an answer.

Having fully answered said bill, defendant prays that he be hence dismissed with costs most unreasonably sustained.

WILLIAM F. CUSH,
Defendant.

J. H. BILBREY,
Attorney for Defendant.

DISTRICT OF COLUMBIA, *To wit:*

William F. Cush, being first duly sworn according to law deposes and says that he has read the foregoing and annexed answer by him subscribed and knows the contents thereof; that the things and matters therein alleged of his own personal knowledge are true, and the things and matters alleged upon information and belief he believes to be true.

WILLIAM F. CUSH.

Subscribed and sworn to before me this eighth day of July, 1921.

[NOTARIAL SEAL.]

JOHN F. A. BECKER,
Notary Public, D. C.

10

Suggestion of Death.

Filed February 27, 1924.

* * * * *

Comes now the plaintiff by Clephane and Latimer and Gilbert L. Hall, his attorneys, and suggests to this Honorable Court that on or

about the 18th day of November, 1922, the defendant William F. Cush departed this life, testate, and that on or about the 15th day of January, 1924, this Honorable Court, sitting as a Probate Court, passed an order admitting to probate the will of said decedent and authorizing the issuance of Letters Testamentary to the executrix therein named, to wit, Nora T. Cush; that she has qualified as such executrix and that Letters Testamentary have since been duly issued to her and that she is now acting as such, and that as such executrix she is now entitled to receive from herself as former collector of said estate, the sum of about Forty-six Thousand Five Hundred and Sixty-eight Dollars and Eighty Cents (\$46,568.80).

CLEPHANE & LATIMER,
GILBERT L. HALL,
Attorneys for Plaintiff.

Answer of Executrix.

Filed March 18, 1924.

* * * * *

Nora T. Cush, the duly appointed executrix of the estate of William F. Cush, deceased, who has qualified as such, files this answer to the bill of complaint filed herein, and respectfully shows unto this Honorable Court as follows:

11 1. The executrix admits the citizenship, residence and age of the plaintiff but denies that the plaintiff has any right in himself to file the said bill of complaint.

2. The executrix admits the citizenship, residence and age of the deceased defendant, William F. Cush, but denies that said deceased defendant was subject to suit in his own right by the plaintiff, William H. H. Allen.

3. The executrix admits that in or about the month of August 1915, the defendant William F. Cush, was negotiating for a contract with John H. Parker Company, a corporation for excavation work in the construction of the Interior Department Building at 18th and F streets, N. W. in the City of Washington, District of Columbia, but denies that the said deceased defendant applied to the plaintiff for his personal aid and assistance in obtaining said contract or in financing the progress and completion thereof; and denies that it was agreed by and between the plaintiff trading as W. H. H. Allen Construction Company and the said deceased defendant that the said contract for excavation should be taken in the deceased defendant's name; and denies that there was any agreement between the plaintiff, trading as W. H. H. Allen Construction Company, and the deceased defendant relating to the control and supervision of the job, the furnishing of the deceased defendant's plant, equipment, skill and labor, or relating to any assistance on the part of plaintiff in obtaining said contract, in procuring a surety bond, in financing the prosecution of the work under said contract or for the advice and counsel of the

plaintiff, or that the plaintiff and deceased defendant should share
equally the profits and losses arising out of said contract, all
12 as alleged in paragraph three of said bill.

4. The executrix admits that a contract was entered into between the deceased defendant and the John H. Parker Company on or about the eleventh day of August, 1915 and that said contract was prosecuted to completion at a total cost of about \$50,000.00 but denies that said contract was entered into through the aid and assistance of the plaintiff, and denies that said contract was completed through the aid and assistance, money and financial help and credit furnished, used or extended by the plaintiff.

5. The executrix admits the dispute between the deceased defendant and the said John H. Parker Company and the filing of suit and the settlement thereof as alleged in paragraph five but denies that the plaintiff advanced any part of the cost of said suit and denies that the deceased defendant or this executrix is indebted to the plaintiff in any amount whatsoever by reason of the settlement of said suit and denies that the plaintiff is entitled to any share of the proceeds of said settlement, and denies that the plaintiff has any right to an accounting from said deceased defendant or the executrix by reason of the settlement of said suit.

6. The executrix admits that it was necessary during the prosecution of said contract to acquire, buy and hire certain additional plant and equipment, including the iron rail and other materials and equipment set forth in paragraph six but denies that the plaintiff guaranteed the return of any of said plant, equipment and material to the owner thereof and denies that there was any right in the plaintiff to the said property or to an accounting therefor, and
13 denies that there now exists or ever existed any right in the plaintiff to require an accounting from the deceased defendant or from this executrix in relation to any property set forth in paragraph six.

7. The executrix denies that the deceased defendant has at different times or at all collected and received any moneys whatsoever belonging to the plaintiff growing out of and arising from the prosecution of said contract, or from any other cause whatsoever, and denies that the plaintiff is entitled to any share, in any amount, of the moneys received by the deceased defendant as a result of said contract, and denies that the plaintiff has any right to an accounting for or by reason of any money received by the deceased defendant growing out of and arising from said contract.

8. The executrix denies that there ever existed a partnership relation between the plaintiff and deceased defendant and denies that the plaintiff is entitled to an accounting from the deceased defendant or from this executrix in reference to any money and personal property acquired and received by the deceased defendant, or any disbursements made therefrom; and further denies that the plaintiff is entitled to a discovery from this executrix of any receipts and disbursements ever had or made by the deceased defendant, or a discovery as to the disposition and present whereabouts of the personal

property described in the fifth, sixth and seventh paragraphs of the bill of complaint, or any other personal property whatsoever.

Further answering the said bill of complaint and each and every paragraph thereof and each and every material allegation contained in said paragraphs, the executrix states the fact to be
 14 that no contract or agreement, oral or written, was ever had or made by and between the deceased defendant, in his lifetime, with the said plaintiff, William H. H. Allen, or with the said plaintiff, trading as W. H. H. Allen Construction Company, in any manner connected with or relating to the said contract between the deceased defendant and the John H. Parker Company, a corporation, and that no partnership or contract ever existed between them in relation to the John H. Parker Company contract, and that any transactions, if any, which the said deceased defendant may have had with the said plaintiff, William H. H. Allen, was with the said William H. H. Allen in his representative capacity of agent for and in behalf of the W. H. H. Allen Construction Company, a corporation organized and doing business under the laws of the State of West Virginia.

Having fully answered said bill of complaint the executrix prays that the same be dismissed with allowance to her of her reasonable costs and the costs of the deceased defendant in this suit unjustly sustained.

NORA T. CUSH,
Executrix.

L. E. TANNER,
Attorney for Executrix.

DISTRICT OF COLUMBIA, ss:

I, Nora T. Cush, executrix, upon oath depose and say, that I have read the foregoing and annexed answer by me subscribed and know the contents thereof; and that the statements of fact therein
 15 made as upon personal knowledge are true, and those made as upon information and belief, I believe to be true.

NORA T. CUSH,
Executrix.

Subscribed and sworn to before me this 18 day of March, 1924.
 [NOTARIAL SEAL.]

E. E. MOORE,
Notary Public, District of Columbia.

The filing of this answer by the Executrix after the ten day period provided for by the Rules of Court was consented to by us prior to the expiration of said ten day period.

CLEPHANE & LATIMER,
 GILBERT L. HALL,
Attorneys for Plaintiff.

Amendment to Bill of Complaint.

Filed May 24, 1924.

* * * * *

Comes now the plaintiff, and leaves of the Court being first had and obtained, files this his amendment to the bill of complaint originally filed by him, so that paragraph 3 of said bill as originally filed shall hereafter read as follows:

3. In or about the month of August, 1915, the defendant
16 William F. Cush, being desirous of obtaining a contract for excavation with John H. Parker Company, a corporation, having a contract with the United States for construction of the Interior Department Building at Eighteenth and F Streets, Northwest, in the City of Washington, D. C., applied to the plaintiff for his aid and assistance in obtaining said contract for excavation and in financing the progress and completion thereof. The plaintiff informed the said defendant that he would furnish such aid and assistance through the W. H. H. Allen Construction Company, a corporation created and then existing under and by virtue of the laws of the State of West Virginia, in which corporation this plaintiff was the principal stockholder. A formal agreement was then entered into in writing between the said W. H. H. Allen Construction Company and the said Cush, dated the 11th day of August, 1915, a copy of which is hereto attached and marked Exhibit A, and prayed to be taken and considered as a part hereof. Thereafter and in accordance with the terms of said contract, the said plaintiff, at times through the said Construction Company and at times by himself individually, furnished the necessary moneys to carry on the said contract between the said Cush and the said John H. Parker Company, said moneys being raised partly by promissory notes upon which the said construction company had obligated itself as a party, and partly by personal advances made by the plaintiff to the said Cush, or at the request of said Cush in the payment of items necessary in the prosecution of said excavation contract. The moneys received as the result of said advances on said notes and as payments
17 by the John H. Parker Company on account of said excavation work were from time to time deposited in the Franklin National Bank to the joint account of the said Cush and the said Construction Company and drawn out by checks signed by the said Cush and the said Construction Company jointly in accordance with the said contract. The said defendant Cush was during all the time that the said contract for excavation was in progress, the general manager of the operation thereof and in charge of the work. And the plaintiff further says that prior to the date of the filing of this suit and after the work of said excavation had been completed, the said W. H. H. Allen Construction Company, in consideration of this plaintiff assuming its obligation, which he had at that time

assumed, transferred and assigned to this plaintiff all its assets, including its rights against the defendant Cush.

WM. H. H. ALLEN.

CLEPHANE & LATIMER,
GILBERT L. HALL,
Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing and annexed amendment to the bill of complaint filed by me and know the contents thereof, and that I verily believe that the matters and things therein stated are true.

WM. H. H. ALLEN.

Subscribed and sworn to before me this 13th day of May, 1924.
[NOTARIAL SEAL.]

W. D. ELLETT,
Notary Public, D. C.

18

EXHIBIT A.

Memorandum Agreement.

This memorandum agreement made this eleventh day of August in the year 1915, by and between William F. Cush, of Washington, D. C., party of the first part, and the W. H. H. Allen Construction Company, a corporation organized and doing business under the laws of the State of West Virginia, party of the second part,

Whereas, the said party of the first part has signed a contract with the John H. Parker Company, a corporation organized and doing business under the laws of the State of New York, for the excavating of the property known as the Interior Department building, a copy of which contract is herewith attached and made a part hereof, as if the same was duly set forth; and

Whereas, it was necessary for the party of the first part to have certain financial assistance and guaranty under the terms of this contract, which was set forth in letter dated August 11 to the party of the second part, a copy of which is herewith attached and made a part hereof, as if the same was incorporated herein;

Now therefore witnesseth: In consideration of the mutual promises of the parties to this agreement, the party of the second part hereby agrees to furnish to the party of the first part the necessary moneys to carry on the said contract, said party of the first part to execute and deliver to the party of the second part his promissory notes for the sum necessary to the prosecution of said work.

19 It is further covenanted and agreed that in consideration of said financial assistance and guarantee as hereinabove set forth, the party of the second part is to receive fifty per cent of the profits of said contract, and the party of the first part is to receive fifty per cent of the profits of said contract; and the party of the second part is to share fifty per cent of the losses on said contract, if any, and the party of the first part is to share fifty per cent of the losses on said contract, if any.

It is further understood and agreed that the party of the first part shall furnish without cost or rent his shovel or incidental equipment necessary thereto, and such equipment as he had as would be useful on this contract, and shall furthermore furnish his undivided time and attention in the handling of said contract without any compensation, save and excepting his division of the profits.

It is further covenanted and agreed that all moneys expended in the necessary operation of this contract shall be by checks, which shall bear the signature of the treasurer of the party of the second part, and shall be countersigned by the party of the first part. All expenditures necessary and incident to the proper operation of this contract shall be duly vouchered in accordance with the form of voucher of the W. H. H. Allen Construction Company, with the necessary bills attached to said vouchers.

It is further understood, covenanted and agreed that all materials to be purchased or rented shall be mutually agreed to by both parties to this contract.

It is further covenanted and agreed that the estimates received from time to time in payment of work done shall and are by these presents hereby assigned to the W. H. H. Allen Construction
20 Company.

It is further covenanted and agreed that no profits shall be distributed until the entire completion of the work and the receipt of the entire money due on said contract.

It is further covenanted and agreed that no profits shall be distributed until all bills, accounts, labor, rental of plant, and any other expenditures on this contract, are paid, as well as the promissory notes for sums necessary to the prosecution of said work hereinabove set forth are marked paid and canceled.

It is further covenanted and agreed that this contract is binding on the heirs and assigns of the party of the first part and the successors and assigns of the party of the second part.

It is further covenanted and agreed that in the event of any disagreement between the parties to this agreement, the said matter of disagreement shall be submitted to the arbitration of two disinterested parties, one to be selected by each of the parties thereto; and in the event of such arbitrators not agreeing, they, the said arbitrators, shall mutually select a third arbitrator, and the award of said arbitrators shall be finally binding upon the parties to this agreement, their heirs, successors, or assigns.

It is further understood and agreed that the party of the first part is to be the general manager of the operation of this contract, having charge of the work, and using his best efforts to the success of both parties to this agreement.

Witness our hands and seals this eleventh day of August,
21 A. D., 1915.

WILLIAM F. CUSH, [SEAL.]
Party of the First Part.

BENSON B. ALLEN, [SEAL.]
Party of the Second Part, Sec. & Tres.

Answer to Amendment to Bill of Complaint.

Filed August 23, 1924.

* * * * *

Comes now Nora T. Cush, the duly appointed executrix of the estate of William F. Cush, deceased, who has qualified as such, and files this, her answer to the amendment to the bill of complaint, and respectfully shows unto this Honorable Court as follows:

3. In answer to the amended paragraph three (3), the executrix, on information and belief, admits that in or about the month of August, 1915, the defendant, William F. Cush, was negotiating for a contract with the John H. Parker Company, a corporation, for excavation work in the construction of the Interior Department Building, at 18th and F Streets, Northwest, in the City of Washington, District of Columbia, and with respect to all other allegations in said paragraph regarding the alleged negotiations between the plaintiff and defendant and in regard to the alleged contract of August 11, 1915, between the defendant and the W. H. H. Allen Construction Company, a corporation, and with regard to the alleged financial transactions between the plaintiff and the defendant and between the said corporation and the defendant, as well as each and every other allegation in said paragraph three (3), inclusive
 22 of the alleged assignment of the alleged contract from the said corporation to the plaintiff, the executrix states that she has no personal knowledge thereof and from her best information and belief she denies the same, and if evidence thereof is legally admissible in this case she calls for strict proof thereof.

Having answered said amendment to the best of her ability the executrix adopts her previous answer as to the remainder to said bill of complaint and prays that the amended bill be dismissed with costs against the plaintiff.

NORA T. CUSH.

L. E. TANNER,
 ALEXANDER WOLF,
Attorneys for Defendant.

DISTRICT OF COLUMBIA, ss:

I, Nora T. Cush, executrix, upon oath depose and say, that I have read the foregoing and annexed answer to the amendment to the bill of complaint by me subscribed and know the contents thereof; and that the statements of fact therein made as upon personal knowledge are true, and those made as upon information and belief, I believe to be true.

NORA T. CUSH.

Subscribed and sworn to before me this 23rd day of August, 1924.

[NOTARIAL SEAL.]

NATHAN CAYTON,
Notary Public, District of Columbia.

Final Decree.

Filed December 13, 1924.

* * * * *

This cause came on to be heard at this term, and thereupon, upon consideration thereof, it is, this 13th day of December, A. D. 1924, Adjudged, ordered and decreed, as follows:

(1) That defendant pay forthwith to plaintiff the sum of \$1,-168.75, with interest from the 19th day of July, 1920, being one-half of the money received by defendant's testator, upon the settlement of case No. 61,317 on the law side of this court.

(2) That defendant also pay to plaintiff the further sum of Seven Hundred and Fifty Dollars (\$750), with interest from the first day of January, 1917, immediately upon the filing in this cause of a release by W. M. Kefauver, trading as W. M. Kefauver Company, of all claims and demands by him against the parties hereto, or either of them, arising out of the loan by said W. M. Kefauver of certain irin rail mentioned in the sixth paragraph of the bill of complaint.

(3) That defendant pay to plaintiff the costs of this suit to be taxed by the Clerk.

By the Court:

A. A. HOEHLING,
Justice.

Order Fixing Bond on Appeal.

Filed December 16, 1924.

* * * * *

The defendant having, in open court, noted an appeal from the decree passed herein, it is, by the Court, this 16th day of December, 1924, adjudged and ordered that the amount of undertaking on appeal be and the same is hereby fixed at the sum of Three Thousand Dollars (\$3,000.00), and the amount of undertaking for costs on appeal is hereby fixed at One Hundred Dollars (\$100.00) or in lieu thereof a cash deposit of Fifty Dollars (\$50.00).

A. A. HOEHLING,
Justice.

Memoranda.

January 6, 1925.—Bond on appeal of deft. for \$3,000 approved, filed.

Bond on appeal of deft. for \$100 approved, filed.

Assignment of Errors.

Filed February 4, 1925.

* * * * *

The defendant assigns as errors on the part of the trial court the following:

1. In admitting the testimony of the witnesses Selden and Orri-son as to conversations and transactions had with deceased.
2. In admitting in evidence the copies of the alleged contract be-
25 tween deceased and the W. H. H. Allen Construction Com-pany.
3. In compelling counsel for defendant to produce an alleged copy of the alleged contract between deceased and the W. H. H. Allen Construction Company, in the absence of any notice to produce on the part of counsel for plaintiff and over the objection of counsel for defendant.
4. In comparing the handwriting of deceased on his answer to the original bill with checks and notes offered in evidence.
5. In admitting in evidence the checks and notes (plaintiff's ex-hibits one to twenty-nine, inclusive).
6. In admitting in evidence the statements (plaintiff's exhibits thirty-one to thirty-two).
7. In admitting in evidence the resolution of the W. H. H. Allen Construction Company (plaintiff's exhibit —).
8. In admitting in evidence the answer to the original bill of complaint filed by the deceased in his lifetime.
9. In overruling defendant's motion to dismiss the bill of com-plaint made at the close of plaintiff's case.
10. In ruling as matter of law that the evidence was sufficient to establish the execution the alleged contract between deceased and the W. H. H. Allen Construction Company.
11. In ruling as matter of law that the evidence was sufficient to establish all the terms and conditions of the alleged contract between deceased and the W. H. H. Allen Construction Company.
12. In ruling as matter of law that the evidence was suffi-
26 cient to establish the copies offered in evidence as true and correct copies of the original of said alleged contract.
13. In ruling as matter of law that the copies of said alleged con-tract were sufficient evidence of the entire contract, although not accompanied by the letter of August 11, 1915, and contract between the deceased and the John H. Parker Company (or copies thereof), both of which are specifically referred to in said copies as being attached to and made a part of said alleged contract.
14. In ruling as matter of law that the evidence was sufficient to prove performances of the alleged contract on the part of the W. H. H. Allen Construction Company.
15. In ruling as matter of law that the plaintiff was not obliged to

seek arbitration under the terms of the alleged contract prior to the filing of suit.

16. In ruling as matter of law that the ultra vires of a partnership contract on the part of the W. H. H. Allen Construction Company, a corporation, did not defeat plaintiff's right to recover.

17. In ruling as matter of law that the alleged agreement of guaranty on the part of the W. H. H. Allen Construction Company was sufficiently proved.

18. In ruling as matter of law that a verbal guaranty is binding on a corporation.

19. In ruling as matter of law that the alleged agreement of guaranty was not ultra vires of the W. H. H. Allen Construction Company.

20. In ruling as matter of law that the plaintiff was entitled to recover on the alleged guaranty of the W. H. H. Allen Construction Company.

21. In ruling as matter of law that the evidence was sufficient to entitle plaintiff to maintain this suit.

22. In ruling as matter of law that the plaintiff was entitled to recover the sums set forth in the final decree or any amount, whatsoever, in this suit.

23. In passing the final decree of December 13, 1924.

L. E. TANNER,
ALEXANDER WOLF,
Attorneys for Plaintiff.

Memorandum.

February 10, 1925.—Statement of Evidence signed by Hoehling, J.

Designation of Record.

Filed January 28, 1925.

* * * * *

1. Original Bill of Complaint.
2. Answer of William F. Cush.
3. Answer of Executrix to original bill.
4. Amendment to bill of complaint, and Exhibit A attached thereto.
5. Suggestion of Death, filed Feb. 27, 1924.
6. Answer of Nora T. Cush, executrix to amended bill of complaint.
7. Decree awarding recover to plaintiff.
8. Order fixing amount of bond on appeal.
9. Memo. of bond on appeal.
10. Statement of evidence.
11. Assignment of errors.
12. This designation.

L. E. TANNER,
Atty. for Deft.

29 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 28, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 39075 in Equity, wherein William H. H. Allen is Plaintiff and William F. Cush is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 30th day of March, 1925.

[Seal of Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

30 In the Supreme Court of the District of Columbia.

Equity. No. 39075.

WILLIAM H. H. ALLEN

v.

NORA T. CUSH, Executrix of the Estate of William F. Cush, Deceased.

Be it remembered, that at the hearing of the above case before Mr. Justice Hoehling, holding Equity Court, which hearing began December 1, 1924, and thereafter was further proceeded with, **Charles Selden, Jr.**, a witness produced on behalf of the plaintiff, being first duly sworn, testified in substance as follows:

That he was a stockholder, officer and director of the W. H. H. Allen Construction Company, a corporation organized under the laws of the State of West Virginia, which corporation was one of the original parties to the contract sued on by the plaintiff, but that for a number of years past he had had no connection with said company, and had no interest in the result of this suit; whereupon counsel for defendant objected to the witness testifying to any transactions had by him, in behalf of said corporation, with the defendant (now deceased) who was the other party to said contract, objection being made on the ground that the witness was incompetent under Section 1064 of the Code of Law for the District of Columbia. Thereupon the Court ruled that the testimony would be admitted subject to said objection and reserve his ruling on said objection until later.

31 The witness then testified that three or four conversations were had between himself and the deceased in negotiating the contract sued on at some of which other persons were present, particularly a conference at the Raleigh Hotel at which Mr. Campbell, representing the John H. Parker Company, of New York, which had the contract for erecting the new Interior Department building, and Mr. Harry Allen were present. As to the first conference, the witness stated: "we discussed the matter and he (the deceased) informed me what price per cubic yard he would get for the job. The whole matter was gone into and he stated he only had a small steam shovel and incidental plant and he would like to know whether he could not make some arrangements to get what we had. Then we discussed the terms that I thought would be satisfactory to Mr. Allen in reference to this contract. We next discussed the profits and losses and also Cush to place on the contract what plant he had, without rental, and all other costs and charges were to be paid for out of the fund and at the end of the work that those assets that were permanent and had been purchased would be sold and disposed of and after all obligations were settled and paid the division would be fifty fifty. I was not positive whether he would get the contract or not and wanted to go into that phase of the matter.

Then I think it was a few days after he asked me to go to a hotel and meet the representative of the Parker Company, Mr. Campbell, and assure him that if Mr. Cush got the contract the Allen Construction Company would stand behind it and assure him it would be carried through to completion.

Mr. Cush and Harry Allen and I met Mr. Campbell and I notified them if prices could not be secured and necessary arrangements made for car transportation I would not advise the Allen Construction Company to go into it and I would like to have them all
32 discuss it with Mr. Allen, himself, and I would like to have his view also. We then repaired that evening to the porch of Mr. William H. H. Allen's house at 109 "C" Street, Northeast. I then explained to Mr. Allen and we discussed the terms under which Mr. Cush would operate. I told Mr. Allen I thought if we could get together as to price, etc., that Mr. Cush had a good reputation in this city and knew his business, and he said "well, if this matter is redrawn as you have stated, I will do so." We then had a further conference between Mr. Campbell, Mr. Cush and myself in Mr. Campbell's room at the Raleigh Hotel, where we assured Mr. Campbell that we would stand behind Mr. Cush and see that the contract was properly carried through. Mr. Campbell wanted to be sure of the work starting promptly and we assured him of this fact and also of its completion. He had not let the contract to anyone at that time, but although he said he had bids for this work from others, he was favorable to Mr. Cush."

The witness further testified that when it came to signing up the contract between the Parker Company and Mr. Cush, the Parker Company wanted a written guarantee from the Allen Construction Company that they would stand behind Mr. Cush and B. E. Hinton,

Esq., attorney for the Parker Company prepared such guarantee which the witness advised Mr. Allen to sign, and which Allen did sign and which Campbell carried away with him. The witness identified the copy of this guaranty as the same appears in this record in connection with the testimony of the Witness Hinton.

That the contract here sued upon was prepared by him on his own typewriter, two originals and three carbon copies [3 3]* signed by Mr. Cush at witness' office; that he saw the deceased sign it, and the contract was then sent by witness to Mr. Benson B. Allen, then in

33 Ohio, for his signature; that he did not see Benson B. Allen sign it, that Benson B. Allen was then Secretary and Treasurer of the W. H. H. Allen Construction Company, and had authority to sign the contract on behalf of that company, and that it was returned to him with the signature thereon of Benson B. Allen, with which signature witness was familiar. Defendant's counsel objected to so much of the testimony as attempted to state that Benson B. Allen had authority to sign the contract on behalf of the company, which objection was overruled and an exception duly noted.

That some time after execution of contract sued on the deceased requested the witness's original for use in connection with his suit against the Parker Company and that original was delivered to Mr. Cush.

That the copy exhibited to him by counsel for plaintiff was a carbon copy of the original taken by witness from his files and handed by him to plaintiff's counsel after this suit — commenced.

That all payments by the Parker Company to the deceased under his contract were made to and received by the Allen Construction Company and the Allen Construction Company kept all the books and records of the work, but the work was done under the supervision of Mr. Cush.

The witness then identified certain paid checks and vouchers (plaintiff's exhibits 1 to 29) as bearing the signatures of the deceased, W. H. H. Allen, and of Benson B. Allen, and also identified certain paid promissory notes as hereinafter listed. Said documents were offered in evidence by the plaintiff. The promissory notes referred to are described as follows:

Note dated Aug. 14, 1915, @ 90 days, for \$5,000, signed by William F. Cush to order of Franklin National Bank, endorsed: "W. H. H. Allen Const. Co. by W. H. H. Allen, President."

Note dated Sept. 7, 1915, @ 90 days, for \$3,000, signed by William F. Cush to order of Franklin Nat. Bank, endorsed: "W. H. H. Allen Construction Co. by W. H. H. Allen, President."

34 Two notes dated October 30, 1915, @ 90 days, for \$4,500 each, signed by Wm. F. Cush, to order of Franklin National Bank, one endorsed: "W. H. H. Allen Construction Co. by W. H. H. Allen, President," and the other: "W. H. H. Allen Const. Co. C. Selden, Jr. Atty."; the latter also endorsed by C. Selden.

[*Figures enclosed in brackets erased in copy.]

Note dated Nov. 13, 1915, @ 90 days, for \$3,500, signed by William F. Cush, to order of Franklin National Bank, endorsed: "W. H. Allen Construction Co. by Charles Selden, Jr., atty." also by C. Selden, Jr.

Note dated November 8, 1915, @ 60 days, for \$3,500, signed by William F. Cush, to order of Commercial National Bank, endorsed: "W. H. H. Allen Construction Co. by W. H. H. Allen, Jr., Vice President."

Note dated December 22, 1915 @ 30 days, for \$2,000, signed by William F. Cush, to order of W. H. H. Allen Construction Company, and by it endorsed by W. H. H. Allen, President, bearing the stamp of the Franklin National Bank.

Note dated December 8, 1915 signed by William F. Cush, @ 30 days, for \$1,000, to order of W. H. H. Allen Construction Co., and by it endorsed and by W. H. H. Allen, bearing the stamp of the Commercial National Bank.

Note dated February 4, 1916, @ 60 days, for \$1,000 signed by William F. Cush to order of W. H. H. Allen Construction Co. and by it endorsed by Benson B. Allen, Treas., bearing the stamp of the Franklin National Bank.

Note dated April 13, 1916, signed by William F. Cush, @ 30 days, for \$2,000, to order of Wm. H. H. Allen, and by him endorsed, bearing the stamp of the Franklin National Bank.

35 The first two of the above notes were accompanied by vouchers on the printed form of voucher of the W. H. H. Allen Construction Co., showing that said notes had been discounted "to carry on work on Interior Department job." The other vouchers were on the same printed form, stating that the notes referred to were discounted at the bank.

The checks referred to are described as follows:

The following with the exception hereinafter noted were all signed by W. H. H. Allen:

Check to order of W. F. Cush, dated June 22, 1916, for \$275 and by him endorsed.

Check to order of Wm. F. Cush, dated October 28, 1916, for \$761.96 and by him endorsed.

Check to order of W. F. Cush, dated November 13, 1916, for \$7.50 and by him endorsed.

Check to order of W. F. Cush, dated April 2, 1917, for \$7.50 and by him endorsed.

Check to order of W. F. Cush, dated May 5, 1917, for \$7.50 and by him endorsed.

Check to order of Wm. F. Cush, dated No. 12, 1917, for \$7.60 and by him endorsed (bearing on its face in ink in the same handwriting as the body of the check, the following "1½ Int. on Note").

Check to order of W. F. Cush, dated February 11, 1918, for \$7.65, and by him endorsed, (bearing on its face in ink in the same handwriting as the body of the check, the word "Int.").

Check to order of R. P. Barnard, attorney, dated Feb. 18, 1918, for \$100, endorsed by said Barnard (bearing on its face in ink in the

same handwriting as the body of the check, the words "Damage suit Interior Building").

Check to order of W. F. Cush, signed "W. H. H. Allen & Son by Benson B. Allen," countersigned by W. H. H. Allen, dated
36 April 1, 1918, for \$7.58, endorsed by said Cush.

Check to order of W. F. Cush, dated May 4, 1918, for \$50.00, endorsed by said Cush.

Check to order of W. F. Cush, dated May 15, 1918, for \$33.70 endorsed by said Cush (bearing on its back following said endorsement, in pencil, the following: "Curtil Int. & protest stamps").

Check to order of W. F. Cush, dated July 1/18, for \$104.57 endorsed by said Cush (bearing on its face in ink in the same handwriting as the body of the check "C. & I.," and on its back following said endorsement in pencil, the following: "Int. & curtil on note 100.00").

Check to order of W. F. Cush, dated August 2, 1918, for \$57.22, endorsed by said Cush, (bearing on its back following said endorsement, in pencil, the words: "Int. & curtil note 50.00").

Check to order of W. F. Cush, dated August 30, 1918, for \$53.56, endorsed by said Cush (bearing on its back following said endorsement, in pencil, the words "Curtil & Int.").

Check to order of B. B. Allen, dated Oct. 30, 1918, for \$150 and endorsed by B. B. Allen and Cush.

Check to order of W. F. Cush, dated Nov. 2, 1918, for \$7.37 endorsed by said Cush (bearing on its back following said endorsement, in pencil, the words "1/2 int. on A. C. Cont.").

Check to order of W. F. Cush, dated April 1, 1919, for \$27.65, endorsed by said Cush.

37 Check to order of Wm. F. Cush, dated April 12, 1919, for \$25.31 and by him endorsed.

The witness also testified that during the progress of the work certain equipment was hired by the Allen Construction Company and deceased, among which was certain iron rails used on said work, obtained from a man named Kefauver, the return of which was guaranteed by the Allen Construction Company and by Cush, and that after the completion of the work the rails were not returned to said Kefauver, and upon learning that said rails were being taken away from the place where stored, witness called the matter to the attention of deceased and asked if he (witness) should put the matter in the hands of the police, to which deceased replied in the negative, stating that he (the deceased) would investigate it.

Witness also identified a certain resolution passed by the stockholders of the Allen Construction Company, dated July 2, 1918, (plaintiff's exhibit 30), and stated it was passed at a meeting at which he was present and that it bore the signature of a Mr. Orrison, who acted as secretary of the meeting; and that the directors and stockholders of the company were the same, and that while no formal transfer of the assets had been made, Allen assumed and paid all the liabilities of the company which were many thousands of dollars in excess of its assets, and took over the assets.

Upon objection being renewed by counsel for deceased to the entire line of testimony by the witness, it was stated by the Court to be understood that the objection went to all of the testimony and that it was received subject to the ultimate ruling of the Court.

Cross-examination :

On cross-examination the witness stated that he did not know the deceased prior to the negotiations he had with him in behalf of the Allen Construction Company, that he had never seen the signature of deceased prior to the execution of the contract sued on, that the only knowledge he had of deceased's handwriting was gained by reason of association with Cush while the work was progressing, and from having seen him sign his name frequently in connection with transactions relating to the work, and upon being shown three
38 specimens of handwriting, in the name of the deceased, he would not state whether either of them was or was not the signature of deceased.

Also that he was one of the incorporators of the Allen Construction Company and was with them about fifteen years.

That he could not give the language used by deceased in any statement he had testified to and his best recollection was as to the objects or subjects of the several conferences and the results obtained.

That the guarantee of the Allen Construction Company for return of the iron rails was not in writing.

That he did not know when the work contracted for by deceased was completed; did not think the work was very profitable and did not know what the suit filed by deceased against the Parker Company was for; that he was not on the job all the time.

Whereupon, **Bynum E. Hinton, Esquire**, a witness produced on behalf of the plaintiff, being first duly sworn, testified in substance as follows:

That he is a member of the local Bar and that on August 11, 1915, there was a conference in his office between the deceased, W. H. H. Allen and Charles Selden, Jr., at which witness was present; that witness represented the Parker Company which was a New York corporation having its office in New York City, which company desired a guarantee from the deceased that he was able, financially, to prosecute to completion the excavation work for the new Interior Building under the proposed contract between the deceased and the Parker Company, and that he prepared a guarantee, in writing, a copy of which was identified by him as being a copy found by him in the files of his office and which is as follows:

39

Copy.

430 O Street N. W.,
Washington, D. C., August 11, 1915.

The John H. Parker Company,
315 Fourth Avenue,
New York, N. Y.

GENTLEMEN:

Regarding the contract of even date awarded by you to William F. Cush for excavating the Interior Department Building site, I hereby in consideration for the making by you of this award to Mr. Cush at the price agreed upon, agree to render him such assistance as may be necessary to enable him to procure satisfactory surety for the proposed bond, and I further guarantee the faithful prosecution and satisfactory completion of this contract in every particular within the contract time.

Regarding the matter of his equipment, whatever additional equipment may be necessary I will provide for him.

Very truly yours,

(Signed) W. H. ALLEN CONSTRUCTION CO.
W. H. ALLEN,
President.

The witness further testified that after said guarantee had been signed he had handed it to Mr. Campbell, the representative of the Parker Company who had been sent to Washington to superintend the work, and that Campbell had taken the guaranty away with him; that some weeks prior to the hearing of this case, at the request of plaintiff's counsel, he had written to the Parker Company at New York in the endeavor to get back the original of this guarantee, and that the company had advised him that it could not find the guaranty.

Whereupon **W. M. Kefauver**, a witness produced on behalf of the plaintiff, being first duly sworn, testified in substance as follows:

That he had been in the contracting business for about twenty-five (25) years trading as the W. M. Kefauver Company, and had long known the plaintiff, W. H. H. Allen; that said Allen and Cush came to his office to see him in 1915 for the purpose of renting certain equipment from him, namely, engines, cars, and rails, stating that he would be responsible for the bill; that he received the money for rental of the equipment from the Allen Construction Company and received back the engines and cars after the job was finished but did not receive the rails; that the engines and cars were received back by him in the latter part of 1915, and in January, 1916, he sent a bill for the rails, frogs and switches to the deceased, in the sum of \$1,615 and had followed this with many other bills for the same amount; but that none of his communications on the subject had been answered nor returned to him, and that

neither Cush nor the Allen Construction Company had ever disputed the bill, nor had the bill or any part thereof been paid to him by either the deceased or the Allen Construction Company.

Thereupon **Robt. H. Orrison**, a witness produced on behalf of the plaintiff, being first duly sworn, testified in substance, as follows:

That he was employed by the W. H. H. Allen Construction Company from February, 1912, until September, 1918, as auditor for the company was a stockholder to the extent of one share, and director in said company, and that he now has no connection with said company, and no interest, directly or indirectly in this suit; whereupon counsel for defendant objected to the witness testifying as to transactions between the deceased and said company on the ground that he was incompetent to testify under Section 1064 of the Code. The Court reversed his ruling on the objection, stating that he would admit the testimony subject to said objection.

The witness, testifying, stated that in the course of his employment for the Allen Construction Company, he kept all of the books and records of the work under the contract of deceased with the Parker Company; that he prepared all of the vouchers in payment of the cost of the work and wrote checks in payment which were signed by deceased and Benson B. Allen; and the witness
41 identified checks and vouchers (plaintiff's exhibits 1 to 29) as having been prepared by him and signed as stated; that all checks in payment for work under the contract were paid to the Allen Construction Company.

The witness then testified as follows:

Q. Do you know, as a matter of fact, whether notes were given by the Allen Construction Company and Mr. Cush to any bank? A. Oh, yes, there were several given.

Q. How do you know that? A. Because I had information to draw checks in payment of them, or curtail them.

Q. When those notes were paid, who paid them? A. They were paid generally—when we had any money, they were paid by Mr. Cush and by Mr. Allen, that is, I mean to say by company checks, the check drawn by Vincent B. Allen, treasurer of the Allen Construction Company, and countersigned by Mr. Cush.

He testified that he prepared the statement dated August 31, 1916, which was a statement of gross earnings and operating and office expenses and also the statement which was a trial balance for August, 1916, (plaintiff's exhibits 31 and 32) both of which were prepared at the closing of the regular work under the contract, and did not include extra work done later, and that no statement was made up by him after the extra work for which the Parker suit was filed, had been completed by Mr. Cush, and that said statements (plaintiff's exhibits 31 and 32) were submitted to the deceased by him. Witness then was asked by counsel for plaintiff if any conversation ensued between himself and the deceased when he submitted the statements to Mr. Cush (the deceased), and witness replied: "Well, it was a hard job around there and he did not get very much profit
42 out of that. As a matter of fact we had a good deal of work

together; that was a long job, and he did not make any profit out of it."

The statements were then offered in evidence and here follow:

43 W. H. H. Allen Construction Co.—W. F. Cush.

Statement of Gross Earnings, Operating & Office Expenses.

Interior Dep't.

August 31st, 1916.

Gross earnings:

Estimate—No. 1.....	9,750.00	
Estimate—No. 2.....	18,720.00	
Estimate—No. 3.....	21,947.34	
Extra Work & Yardage.....	4,164.89	
		54,582.23

Operating expenses:

Blacksmith	27.25	
Foreman	2,899.95	
Laborers	16,538.85	
Locomotive Eng. Craneman & Fir.....	4,549.70	
Shovel Runners	1,901.95	
Timekeepers & Clerks	601.15	
Watchman	245.35	
Electric Lighting	70.40	
Electric Wiring	115.40	
Engineering—Civil	175.00	
Freight on Plant	702.91	
Fuel	3,661.29	
Hauling	379.28	
Liability Insurance	520.07	
Moving House	155.75	
Oils & Grease	163.23	
Plant Rental	5,477.67	
Railroad Ties	756.03	
Repairs & Supplies.....	2,437.98	
Return Freight—Plant	236.12	
Surety Bond	480.00	
Teaming.....	7,825.45	
Water Rental	98.37	
		50,019.15

Office expenses:

Postage	.24	
Stationery & Printing	19.10	
Telephone & Telegraph.....	52.71	
Travelling	25.00	
		97.05
Interest & Discount.....		146.33

Recapitulation.

Gross Estimates	54,582.23
Operating, Office Expenses & Interest & D.....	50,262.53
Net profit	\$4,319.70

44 W. H. H. Allen Construction Co.—W. F. Cush.

Trial Balance.

August, 1916.

Accounts Receivable, O. P. Allen.....	77.50	
Allen Construction Co., W. H. H.....	2,000.00	
Bills Payable		2,000.00
Contract No. 5.....		54,582.23
Cush, W. F. Personal.....	2,034.97	
Interest & Discount.....	146.33	
Operating Expenses	50,019.15	
Office Expenses	97.05	
Parker Co., John H.....	2,207.23	
	\$56,582.23	\$56,582.23

Resources & Liabilities.

Resources:

Accounts Receivable, O. P. Allen.....	77.50
Allen Construction Co., W. H. H.....	2,000.00
Cush, W. F., Personal.....	2,034.97
Parker Co., John H.....	2,207.23
	\$6,319.70

Liabilities:

Bills Payable	2,000.00
Surplus	4,319.70
	\$6,319.70

Division of Profits.

Allen Construction Co.—Share.....	3,159.85	
Less 1/2 Bills payable.....	1,000.00	
Less Amount Drawn	2,000.00	
	3,000.00	
		159.85
Cush, W. F.—Share.....	3,159.85	
Less 1/2 Bills payable.....	1,000.00	
Less Amount Drawn.....	2,034.97	
	3,034.97	
		124.88

The following should be on hand:

2257 Railroad ties—Purchased 2607—sold 350—Cost 29¢ each.	
600 Plates—Punched—2" x 1½' Cost 22¢ each.....	132.00
100 Plates—Punched—5/8" x 2' Cost 23½¢.....	23.50
2 Switches—60# Rail—36" Gauge—10' long—cost..	36.00
4 Levers—Ground—Cost	14.00
18 Gasoline Torches—Cost.....	27.00
1 Perfection Oil Stove—Cost.....	2.70

45 The witness further testified that it was his understanding that the profits and losses were to be equally shared by the deceased and the Allen Construction Company; that he had seen the writing of the deceased a good many times also the writing of Mr. Allen, and that he identified the signatures on the checks and notes heretofore identified by the witness Selden, as being the signatures of Allen and Cush respectively.

Witness was then shown a paper dated July 2, 1918, headed Minutes of Stockholders Meeting, W. H. H. Allen Construction Company, (plaintiff's exhibit 30), which he identified as bearing his signature and testified that he was present at that meeting, at which the resolution referred to was actually adopted, and thereafter Mr. Allen took over the assets of the company.

The resolution follows:

(PLAINTIFF'S EXHIBIT 30)

Minutes of Stockholders' Meeting of W. H. H. Allen Construction Company.

"Washington, D. C., July 2, 1918.

A special meeting of the stockholders of the W. H. H. Allen Construction Company under and by virtue of a notice from the Secretary of said Company was duly held at Washington on July 2nd 1918 at 10.30 A. M.

Present:

W. H. H. Allen.....	319	Shares
Benson B. Allen.....	85	"
W. H. H. Allen, Jr.....	85	"
R. O. Orrison.....	1	"
C. Selden, Jr.....	10	"

and R. O. Orrison, Secy.

Mr. W. H. H. Allen was nominated and elected chairman of the meeting. The tellers Messrs. Selden and Benson Allen reported that all of the capital stock of said company was present and represented in person by the holders of same.

The following resolution was made by Benson B. Allen and seconded by W. H. H. Allen, Jr., and unanimously passed:

Whereas the said Company is indebted at this date for approximately \$48,785.84 and whereas it has certain assets consisting of retained percentage from Rhinehart and Dennis of approximately \$14,000 plant and plant rentals and whereas the said

46 W. H. H. Allen, Sr. has endorsed the obligation of the company it is Hereby Resolved by the stockholders of this company that in consideration of the said W. H. H. Allen assuming the said obligations of this company that all of the assets of said company of every kind manner and description are hereby assigned made over and transferred to said W. H. H. Allen, Sr., absolutely to be sold leased or retained the proceeds to be applied to the payment of the above liabilities and if the proceeds from sale or lease should be more than sufficient to pay all of the liabilities with interest the balance from said sale or lease after all liabilities are paid shall be returned to the W. H. H. Allen Construction Company to and for the benefit of all stockholders of said company. And be it further resolved that the Board of Directors of said W. H. H. Allen Construction Co. are by this resolution empowered authorized and directed to execute any mortgage, bill of sale, assignment or other conveyance that may be demanded by the said W. H. H. Allen, Sr., for the transfer of said assets of said company or liabilities therewith:

(Sgd.)

ROBT. H. ORRISON,
Secretary.

Upon motion the meeting adjourned."

Upon objection being renewed by counsel for deceased to the entire line of testimony by the witness, it was stated by the Court to be understood that the objection went to all of the testimony and that it was received subject to the ultimate ruling of the Court.

Cross-examination:

On cross-examination the witness testified that he did not know the deceased prior to his connection with the transactions testified to and that his knowledge of the signature of the deceased was gained through the transactions in question; he was then shown the three specimens of handwriting in the name of deceased, which had been exhibited to the witness Selden, and testified that they did not look anything like the signature of Cush; that no settlement was made between the deceased and the corporation in accordance with plaintiff's exhibits 31 and 32 because "they did not have any money to make it with and because this extra work came in after that".

When asked how the transfer of the assets from the corporation to Mr. Allen was effected, the witness replied: "Well, in this way: on the Ohio job we lost about Thirty Five Thousand Dollars (\$35,000.00), and Mr. Allen, I think, owed the bank in the neighborhood of Nine Thousand Dollars (\$9,000.00), so Mr. Allen assumed those

notes in bank, and he assumed the outstanding obligations. He
47 simply took over the assets. They were located in Scioto-
ville, Ohio, and they stayed there for quite a while and were finally
sold by Allen."

Whereupon, counsel for the plaintiff having first called upon the
counsel for defendant for the production of the original of the alleged
contract between plaintiff and defendant attached to the amendment
to the bill of complaint, and the same not having been produced,
offered in evidence two copies of the alleged contract, one being the
copy obtained from the Allen Construction Company, through the
witness, Selden, and the other being the copy produced from the
files of counsel for defendant, over objection of counsel for defendant,
on the ground that no notice to produce said copy had been given by
counsel for plaintiff, which objection was overruled and an ex-
ception duly noted.

The introduction in evidence of either of said copies was further
objected to by counsel for defendant not only under Section 1064
of the Code but also on the ground that the evidence was insufficient
to establish the original and further insufficient to establish either
copy as a true and correct copy of the original, also that the entire
contract is not before the Court as neither copy introduced in evi-
dence is accompanied by a copy of the letter of August 11, 1915, and
the contract between deceased and the Parked Company, both of
which are stated in the copies to be attached to the contract and
made a part thereof. All of said objections were overruled by the
Court, with the exception of the objection relating to Section 1064 of
the Code the ruling on which was reserved until the ultimate ruling
on all testimony objected to under said Section 1064. Counsel for
defendant duly excepted to the objections overruled, which exceptions
were allowed by the Court and duly noted.

The copies introduced by plaintiff are in identical language as
the same is recited in exhibit A to the amendment to the bill of com-
plaint.

Whereupon, counsel for plaintiff introduced in evidence the record
in Law Cause No. 61,317, entitled "United States of America to
the use of William F. Cush, plaintiff, versus John H. Parker Com-
pany, a corporation, et al., defendants, which was an action at
48 law filed May 20, 1918 by deceased against said Parker Com-
pany and the sureties on the bond of said company, to re-
cover the sum of Four Thousand Six Hundred and Sixty Two Dol-
lars and Twenty Three Cents (\$4,662.23) for extra work performed
by the deceased under his contract with said company, which in-
volves the subject matter of the instant suit. The record in said
law cause contains an affidavit of the deceased, attached to the de-
claration, which states, in part, as follows: "* * * and said
Cush also thereby provided at his own expense all scaffolding, im-
plements, apparatus, machinery, equipment, plants, molds, permits,
models, hoisting and cartage necessary for the due performance of
the said work, * * *". A similar allegation is contained in the
declaration. In said affidavit the deceased further stated that the
balance due him from said Parker Company was the sum of Four

Thousand, Six Hundred and Sixty Two Dollars and Twenty Three Cents, (\$4,662.23), which became due and payable to him from said company on or about April 30, 1916. The bill of particulars attached to said declaration and affidavit show certain items charged for at actual cost, plus ten per cent.

Whereupon, counsel for plaintiff offered and there was received in evidence a receipt from Cush to Levi H. David, and a statement prepared by Levi H. David, Esquire, of counsel for deceased in said Law Cause number 61,317, as follows:

July 14, 1920.

Levi H. David in Account with William F. Cush.

Amount received by Levi H. David from B. E. Hinton Attorney, in compromise settlement; in disposition of the case of U. S. to the use of William F. Cush against John H. Parker Co. and National Surety Co. and others, Law No. 61,317.....		\$2,750.00
By fee, legal and professional services in said case, as per agreement, 15%	412.50	
By check of Levi H. David, to order of William F. Cush, balance	2,337.50	
	<u>\$2,750.00</u>	<u>2,750.00</u>

Received of Levi H. David his check of \$2,337.50, being net amount coming to me, in full, as per foregoing statement.

(Signed)

WILLIAM F. CUSH.

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(Law Cause No. 61317.)

W. F. Cush to H. J. Pack & Levi H. David, Dr.

1918.

May	20.	To retainer agreed upon in case against J. H. Parker & Co., et al.	200.00	
"	20.	By amount paid to L. H. D. for costs..	.....	39.00
"	20.	To amount paid J. R. Young, Clerk, deposit costs	25.00	.....
"	20.	To amount paid U. S. Marshal serving defendants	14.00	.....
"	23.	To amount paid U. S. Marshal serving 5 parties	5.00	.....
"	23.	To amount paid Mattern, registering 7 letters & Postage	.91	.....
"	23.	To amount paid G. W. Reik, typewriting	30.00	.....
"	23.	To amount paid Washington Star, publication	116.00	.....
"	23.	To amount paid Wash. Law Reporter publication	11.41	.....
June	5.	To amount paid U. S. Marshal, (Rule)	4.00	.....
"	6.	By amount received from Wm. F. Cush	.....	130.00
"	13.	By amount received from Wm. F. Cush, Allen's check .....	.....	132.45
"	25.	To amount paid Hodges, Clerk, Court of Appeals	.90	.....
Aug.	6.	To amount paid J. R. Young, Clerk, costs	25.00	.....
Dec.	4.	By amount rec'd from W. F. Cush..	.....	130.77
			\$432.22	\$432.22

Counsel for plaintiff also offered and there was received in evidence a check signed by plaintiff to the order of W. F. Cush dated June 12, 1918, for \$132.45, endorsed by Levi H. David and William F. Cush.

Counsel for plaintiff further offered in evidence the answer in this cause, filed by the deceased, in his life time, which was objected to by counsel for defendant on the ground that it was inadmissible under Section 1064 of the Code. The Court overruled the objection to which the defendant excepted and the exception was allowed and duly noted.

Whereupon **Edward G. Gummel**, a witness produced on behalf of the plaintiff, being duly sworn, testified in substance, as follows:

That he has been engaged in the contracting business in Washington for about forty years and is acquainted with Mr. Allen and was

acquainted with Mr. Cush in his life time, whereupon the following occurred:

Mr. Tanner: May I inquire what Mr. Clephane seeks to prove by this witness? Is it with reference to the ties and so forth?

Mr. Clephane: Yes.

Mr. Tanner: You have already admitted that you make no claim for that.

Mr. Clephane: Not for the ties, but for the other property, consisting of rails, which are worth much more than the ties.

Mr. Tanner: You expect him to testify with regard to the rails?

Mr. Clephane: We admit Mr. Gummel bought some of the ties.

The Court: You are making no claim as to that?

Mr. Tanner: Your claim now is for one-half the amount, as the result of the suit, and one-half the amount of the rails on the guarantee?

Mr. Clephane: Our claim is that we ought to have the whole of it, conditioned upon our satisfying that guarantee, thus relieving your estate and ourselves at the proper time.

Mr. Tanner: What I want to understand is whether or not you now make claim under paragraph six of your bill for railroad ties and other small items—switches, gasoline torches, and so forth?

Mr. Clephane: We are not making any claim for those items that are tabulated there.

The witness then testified that he had hired certain rails to Mr. Cush and Mr. Allen together, which he removed after the excavation work was finished, leaving a quantity of rails there, stating "I judge there was in the neighborhood of thirty or forty
51 tons. Something of that kind."

Cross-examination:

On cross-examination the witness testified that after the job was completed the rails were piled down at Virginia Avenue about 18th or 19th street on a vacant lot and that there was nobody in charge of them.

Counsel for plaintiff made the following statement to the Court:

"We do claim in our bill that there were certain other receipts by Mr. Cush for which he has not accounted, but rather than have a long and tedious accounting and audit, we have decided to abandon that feature of it because we believe the amount for which there has been lack of accounting would hardly justify the expense of an audit."

Thereupon the plaintiff announced his case as closed.

Whereupon counsel for defendant moved to dismiss the plaintiff's bill, on the ground of the incompetency of the witnesses, and inadmissibility of evidence under Sec. 1064 of the Code, the insufficiency of the evidence to prove the contract, to prove performance and in various respects to entitle plaintiff to recover, and on various legal grounds, namely, failure of plaintiff to seek arbitration prior to suit; ultra vires of the agreement of guaranty on the part of a cor-

poration; the Statute of Limitations as regards the claim for rails; ultra vires of an agreement of partnership by a corporation, and after argument thereon the Court overruled the motion, without, however, ruling on the competency of the witnesses whose testimony was objected to under Section 1064 of the Code, but reserving his ruling thereon until the close of the case. Exception to the overruling of the motion was duly taken, allowed and noted.

52 Thereupon counsel for defendant stated that defendant had no testimony to offer.

Whereupon the Court allowed argument by counsel for the respective parties on the question of the competency of the witnesses whose testimony was objected to by defendant under Section 1064 of the Code, and overruled the objection, to which an exception was duly taken, allowed and noted.

In connection with its ruling, *supra*, the Court stated that, irrespective of the question of the legal competency of the testimony under said Section 1064, it had the right to compare an admitted or established writing or writings in the case with a disputed writing, and therefrom reach a conclusion as to the latter.

The foregoing statement of evidence is the substance of all the evidence adduced at the trial and the exceptions therein noted were duly noted at the trial; said statement of evidence was duly submitted to the Court and the same is, this 10th day of February, 1925, approved and signed now for then.

A. A. HOEHLING,
Justice.

_____,
_____,
Attorneys for Defendant.

_____,
_____,
Attorneys for Plaintiff.

Endorsed on cover: District of Columbia Supreme Court. No. 4321. Nora T. Cush, executrix, &c., appellant, vs. William H. H. Allen. Court of Appeals, District of Columbia. Filed Apr. 8, 1925. Henry W. Hodges, clerk.

(6169)